SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 460

LEAH TURPIN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on June 5, 1968.

A. Opinions Below

The only opinion written below was that of the justice presiding in the Supreme Court of the State of New York County of Kings upon the hearing of the motion to suppress evidence. After concluding the hearing he rendered the following oral opinion from the bench:

> "The Court: Motion is denied. I find that the testimony here, if believed—and I believe it is an indi-

cation that there wasn't a search at all but a voluntary abandonment of contraband by these people when they thought arrest was inevitable.

And further, I hold that even under the Draper case, United States against Draper, there was probable cause with respect to the defendant Abdullah, and that under the circumstances at that time, having found the marijuana on him, and extending the probable cause to Turpin; so for both reasons I hold that the motion be denied."

"Mr. Newman: For the record, your Honor, at this time I renew my application in connection with Turpin on the grounds that this is the law of the case, the decision in the Magistrates' Court."

"The Court: Denied. You have an appeal on that. All right, submit order."

There were no other opinions by any of the other Courts of the State of New York in connection with this case.

B. The Grounds Upon Which the Jurisdiction of This Court is Invoked

Jurisdiction in this Court is invoked under Title 28, U.S. Code § 1257(3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Court of Appeals of the State of New York made on June 1, 1968, as aforesaid, and annexed hereto as Appendix B.

C. Questions Presented For Review

(1) Was it a violation of due process of law for the Supreme Court of New York to disregard the granting of a motion to suppress evidence in the New York Magistrate's Court and conduct a new hearing at which the same motion was heard for the second time and deny said motion thereby authorizing its use in evidence upon petitioner's trial?

(2) Did the Supreme Court of New York properly determine that the handing over by petitioner of the alleged contraband to a police officer in the circumstances was with her consent rather than a non-consensual submission to lawful authority and consequently an unlawful search and seizure?

(3) Did the Supreme Court of New York violate petitioner's constitutional protection against unlawful searches and seizures by holding that the probable cause found to exist against another person in her presence was *ipso facto* a basis for finding probable cause as to petitioner?

D. Constitutional Provisions and Statute Involved

The constitutional provisions involved herein are that portion of the Fourth Amendment to the United States Constitution relating to searches and seizures and that portion of the Fourteenth Amendment thereto relating to due process of law.

The statute involved is §813c *et seq* of the New York State Code of Criminal Procedure.

Each of the foregoing is set forth verbatim in this petition as appendices C, D and E respectively.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

Petitioner was originally arrested in Kings County along with two co-defendants upon a charge of possession of marijuana in violation of §1751 of the New York State Penal Law and arraigned in the then Magistrate's Court in Kings County. A preliminary hearing was held in that Court on March 29, 1962. As part of the hearing there was included by petitioner a motion to suppress evidence of the marijuana which was allegedly seized and which was the subject matter of the charge against her. By that time this Court had already decided *Mapp* v. *Ohio* (367 U.S. 643). Prior to this decision the law of New York had not precluded the introduction of evidence obtained in violation of the Fourth Amendment. However, for some time after the decision in *Mapp* v. *Ohio* the State of New York had no legislation providing for motions to suppress evidence. It was not until April 29, 1962, that legislation (§813-c *et seq* Code of Criminal Procedure) came into effect in New York. This legislation provided the basic rocedure for motions to suppress evidence.

Thus, at the time of the aforesaid preliminary hearing and motion the New York Courts were without guiding legislation in that field. Consequently, the New York Courts during this interim period had informally adopted a practice similar to tht Federal Rules of Criminal Procedure regarding motions to suppress evidence obtained by an unlawful search and seizure. Indeed, sections 813c *et seq*, as subsequently enacted, closely parallel rule 41 (e) of those Federal Rules.

At all events, petitioner moved in the Magistrate's Court to suppress the evidence of the alleged marijuana allegedly found in her possession. The motion was granted and the complaint dismissed. No appeal was taken by the District Attorney.

Thereafter on April 27, 1962, petitioner was indicted upon the same charge along with her co-defendant. Pleas of not guilty were entered.

The new statute having now taken effect, the same motion to suppress was on November 15, 1962, again made in the Supreme Court. At the outset of the hearing, counsel asked the Court to hold that as to petitioner Turpin the ruling in the Magistrate's Court had become the law of the case and was binding. The District Attorney, while acknowledging that such a prior determination had indeed been made, urged that the determination was not binding. Mr. Justice McDonald agreed with the District Attorney.

Following the hearing, Mr. Justice McDonald denied the motion. He rendered an oral opinion set forth in Appendix A. The basic testimony adduced by the prosecution at the hearing was that of the arresting officers, which we summarize as follows:

Detective Albano testified that he saw the co-defendant Abdullah leave premises 68 Covert Street. He was carrying a small brown package about two to four inches in his hand. Detective Albano approached him with his badge in hand which he showed to Abdullah. Abdullah thereupon dropped the package to the ground. At the time, Abdullah was in the presence of the petitioner and another co-defendant, one Langford. Detective Albano thereupon placed Abdullah under arrest.

Detective Gorch testified that he observed petitioner leave the premises in the company of the other two co-defendants. She was carrying a paper shopping bag. Gorch approached them and arrested Langford who had thrown a package allegedly containing marijuana to the street. Befor arresting Langford, he exhibited his shield and said "Police. Don't move." At that time petitioner was between the other two defendants. Gorch was about three to five feet away from them.

Detective Sosis, who made the arrest of petitioner, testified that he too saw appellant leaving the premises in question in the company of the two co-defendants with a shopping bag in her hand. He walked toward her. When he was about a foot away from her he told her he was a Police Officer. She thereupon handed him the paper shopping bag. Prior to receiving the bag from her, he had no knowledge as to its contents. He placed her under arrest. The bag was later allegedly found to contain marijuana among its contents.

At the outset of the hearing and prior to taking the above testimony counsel for the petitioner requested the Court to hold that as to this petitioner the ruling in the Magistrate's Court had become the law of the case and was binding upon the Supreme Court. The District Attorney while acknowledging that such a prior determination had indeed been made, urged that the determination was not binding. The Court held that the prior determination was not binding, adding that neither side waives any rights gained in the previous hearing by reason of proceeding with and participating in the instant motion.

At the conclusion of said hearing the Court denied the motion to suppress evidence with an oral opinion previously referred to.

Thereafter on March 27, 1963, petitioner pleaded guilty to unlawful possession of marijuana as a misdemeanor. On September 11, 1963, petitioner was sentenced to an indefinite term in the New York City Penitentiary.

She was incarcerated thereunder from that date until on or about January 15, 1964 at which time she was released on bail pending appeal. She is still at liberty pursuant thereto.

Pursuant to the New York Code of Criminal Procedure authorizing the taking of an appeal from the denial of a motion to suppress evidence after a plea of guilty, petitioner perfected an appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. On April 24, 1967, that Court unanimously affirmed without opinion the conviction of petitioner as aforesaid.

Thereafter on June 13, 1967, the Court of Appeals of the State of New York granted petitioner permission to appeal to that Court. Said appeal was thereafter perfected and argued and on June 5, 1968, the New York Court of Appeals unanimously affirmed the conviction below. No opinion was written by the New York Court of Appeals.

F. The Stages of the Proceedings in Which the Issues Involved Were Raised and the Manner in Which They Were Raised

The constitutional issues presented herein, namely whether the New York Supreme Court was bound by the prior determination in the Magistrate's Court which directed the suppression of the evidence and whether in any event the Supreme Court's determination after taking tes-

timony was in conformity with the Fourth Amendment to the United States Constitution were raised at the earliest procedural opportunities.

The motion to suppress evidence was made upon the preliminary hearing in the Magistrate's Court which was then the first procedural time such a motion could be made. That issue was at all times raised in the Supreme Court and in the Appellate Division and in the New York Court of Appeals.

The issue with respect to the correctness of the order of the Supreme Court denying the motion to suppress evidence was at all times likewise raised in that Court and in the Appellate Division and in the Court of Appeals.

G. Argument Amplifying the Reasons Relied On For Allowance of the Writ

POINT ONE

The motion to suppress evidence having been litigated and granted in the Magistrate's Court prior to indictment, the determination was binding upon the New York Supreme Court after indictment.

It is our position herein that the prosecution was not entitled to two attempts to decide the same motion where it had been once thoroughly litigated and decided adversely to it.

It would seem, that upon ordinary principles of *res adjudicata,* where, as here, all the interested parties were before the Maigstrate's Court and the issue thoroughly litigated, the determination became the law of the case. There is, at least, authority for the proposition that the original Court had inherent power and jurisdiction to finally determine the motion to suppress.

In *People* v. *Beshany,* 43 Misc. 2d 521, 252 N.Y.S. 2d 110 (Sup. Ct. Queens Co., 1964), Mr. Justice Shapiro noted at 252 N.Y.S. 2d 121:

> "The want of specific statutory authority has not, in the past, deterred the courts from exercising an inherent power to suppress illegally obtained evidence (*People* v. *Loria,* 10 N.Y. 2d 368, 374, 223 N.Y.S. 2d 462, 467, 179 N.E. 2d 478, 482; *People* v. *Politano,* 17 A.D. 2d 503, 235 N.Y.S. 2d 712, affd. 13 N.Y. 2d 852, 242 N.Y.S. 2d 491, 192 N.E. 2d 271; *People* v. *Du Bois,* 31 Misc. 2d 157, 159-163, 221 N.Y.S. 2d 21, 23-27)."

In a similar vein, Mr. Justice Sobel wrote in *People* v. *Estrada,* 253 N.Y.S. 2d 876, 879 (Sup. Ct., Kings County 1964):

> "Ordinarily where the *same* criminal action is involved, the findings of a judge of any court having jurisdiction to decide the pre-trial motion (Code Cr. Proc. §813-e; cf. People v. Montanaro, 34 Misc. 2d, 624, 626, 229 N.Y.S. 2d 677, 680) is binding upon the judge of the same *or any other court.* Section 813-d provides, 'If a motion has been made and denied before trial, the determination shall be binding upon the trial court.' Commonly the pre-trial motion and the trial will be in the same court (C.C.P. §813-e, pars. 1, 2). But the findings of another court are also binding (see par. 3). Also while the statute speaks only of *denials* of the motion to suppress being binding, this is because under the statutory scheme (see §813-c, par. 2) the People are prevented from using the evidence if suppressed, viz., 'it shall not be admissible in evidence * * * against the moving party.' The *granting* of a motion to suppress is in that sense final and no issue can arise as to its binding effect upon another court or judge." (Italics the Court's)

The Magistrate's Court having had, under the then existing pre-statutory situation, jurisdiction over the parties and the subject matter, its determination that the evidence was to be suppressed, became the law of the case as between the parties and was thereafter binding upon them.

POINT TWO

The facts as found by Mr. Justice McDonald at the conclusion of the post indictment hearing in the Supreme Court required a holding that the seizure from Turpin was unlawful as a matter of law.

At the conclusion of the hearing Mr. Justice McDonald found as a fact, that the testimony of the arresting officers, which he believed, established not a search but a voluntary abandonment of the contraband when it appeared that arrest was inevitable. Mr. Justice McDonald further ruled that the probable cause established as to the co-defendant Abdullah extended to appellant Turpin. For these two reasons, he denied the motion to suppress. Mr. Justice McDonald stated his opinion as follows (App. A, page A1):

> "The Court: Motion is denied. I find that the testimony here, if believed,—and I believe it is an indication that there wasn't a search at all but a voluntary abandonment of contraband by these people when they thought arrest was inevitable.
>
> And further, I hold that even under the Draper case, United States against Draper, there was probable cause with respect to the defendant Abdullah, and that under the circumstances at that time, having found the marijuana on him, and extending the probable cause to Turpin; so for both reasons I hold that the motion be denied."

It is our position that Mr. Justice McDonald was in error as to the legal effect of the findings of fact made by him.

It is respectfully submitted that from the testimony of the Police Officers, which the Court accepted as true, the handing over of the shopping bag was not voluntary in the legal sense of the word. It was, rather, a submission to lawful authority. It is well settled that a search or seizure otherwise unlawful does not become lawful merely because the arrestee permitted a search of his person rather than forcibly resist the express or implied demand of a Police Officer (*Amos* v. *U.S.*, 255 U.S. 313 [1920]; *Johnson* v. *U.S.*, 333 U.S. 10 [1948]). Such was the situation here. The two co-defendants had been arrested in her presence seconds before. Thus, when Detective Sosis told her he too was a Police Officer, she surrendered the shopping bag by way of submitting without resistance to what was inevitably about to occur, *viz.*, a search of the shopping bag and her ensuing arrest. (See, *Hobson* v. *U.S.*, 226 F. 2d 890).

Mr. Justice McDonald having made these findings of fact, could only come to one conclusion as a matter of law, namely, that the search of the shopping bag was an unlawful search requiring the evidence thereof to be suppressed.

We urge further that the Court erred in holding that the finding of probable cause to arrest the co-defendant Abdullah extended to appellant Turpin. Although, the record indicates that there was lack of probable cause, as to the co-defendant Abdullah, even if we were to assume that probable cause existed as to Abdullah it cannot as a matter of law *ipso facto* extend to persons in his presence. The existence or non-existence of probable cause, as to appellant Turpin,

must depend upon facts relating to her rather than to persons in her presence. At bar, it was conceded by the arresting officer that he had no knowledge of the contents of the bag before arresting her. As to her, then, he clearly had no basis for probable cause to believe that she was committing a crime. It is improper to attach probable cause to one person derivatively through the act of another merely by virtue of the fact of presence.

In *U.S.* v. *DiRe*, 332 U.S. 581 (1948), a search of an occupant of a car, after finding contraband in the possession of another occupant was held to be unreasonable. The Court held that such a search was unlawful since a person by his mere presence at the scene of the arrest does not lose the protection of the Fourth Amendment.

This Court analogized that case to the unlawfulness of a search of a guest in premises specified in a search warrant without a showing of probable cause as to the guest.

The Trial Court therefore erred in holding that probable cause found as to a co-defendant amounted in law to probable cause as to petitioner.

CONCLUSION

The writ of certiorari herein prayed for should be granted.

Respectfully submitted,

WILLIAM SONENSHINE
Attorney for Petitioner

EVSEROFF, NEWMAN & SONENSHINE
Of Counsel

APPENDIX A

Opinion of the New York Supreme Court

At the conclusion of the motion to suppress before Mr. Justice McDonald in the New York Supreme Court, Kings County, Mr. Justice McDonald denied the motion with an oral opinion reading in its entirety as follows:

> "The Court: Motion is denied. I find that the testimony here, if believed—and I believe it is an indication that there wasn't a search at all but a voluntary abandonment of contraband by these people when they thought arrest was inevitable.
>
> And further, I hold that even under the Draper case; United States against Draper, there was probable cause with respect to the defendant Abdullah, and that under the circumstances at that time, having found the marijuana on him, and extending the probable cause to Turpin; so for both reasons I hold that the motion is denied."
>
> "Mr. Newman: For the record, your Honor, at this time I renew my application in connection with Turpin on the grounds that this is the law of the case, the decision in the Magistrate's Court."
>
> "The Court: Denied. You have an appeal on that. All right, submit order."

APPENDIX B

Judgment of the New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 5th day of June in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,

Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR June 5, 1968

2. No. 208 68

The People &c.,

Respondent,

vs.

Leah Turpin,

Appellant.

BE IT REMEMBERED, That on the 17th day of April in the year of our Lord one thousand nine hundred and sixty-eight, Leah Turpin, the appellant in this cause, came here

unto the Court of Appeals, by Evseroff, Newman & Sonenshine, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People & c., the respondent in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. William Sonenshine, of counsel for the appellant, and by Mr. William I. Siegel, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which

record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, June 5, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON
Clerk

APPENDIX C

Fourth Amendment to the United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

APPENDIX D

Fourteenth Amendment to the United States Constitution

The portion thereof pertaining to this petition with respect to due process of law provides as follows:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law* * *"

APPENDIX E

Sections 813c, 813d and 813e of The New York Code of Criminal Procedure

§ 813-c. The motion in general

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 054, § 1, eff. April 29, 1962.

§ 813-d. Time of making and determination

1. The motion shall be made with reasonable diligence prior to the commencement of any trial in which the property claimed to have been unlawfully obtained is proposed to be offered as evidence, except that the court shall entertain a motion made for the first time during trial upon a showing that (1) the defendant was unaware of the seizure of the property until after the commencement of the trial,

or (2) the defendant, though aware of the seizure prior to trial, has, only after the commencement of the trial, obtained material evidence indicating unlawful acquisition, or (3) the defendant has not had adequate time or opportunity to make the motion before trial.

2. If a motion has been made and denied before trial, the determination shall be binding upon the trial court, except that, if it is established that, after the making of such motion, the defendant obtained additional, material evidence of unlawfulness which could not have been obtained with reasonable diligence before the making of the motion, the court shall entertain another motion, or a renewal of a motion, during the trial.

3. When the motion is made before trial, the trial shall not be commenced until the motion has been determined, except that, in the case of misdemeanors and violations, the court having summary jurisdiction over such crimes and offenses may, by general rule of court, provide that the hearing and determination of such motions may be referred to the trial court for determination during the course of the trial upon the consent of the district attorney, or if no contrary general rule of court has been promulgated, the court before which the motion is made shall have discretion either to entertain the motion, or to refer it to the trial court for determination during the course of the trial if the district attorney consents thereto. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.

4. If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained. Added L.1962, c. 954, § 1; amended L.1964, c. 490; L.1967, c. 681, § 88, eff. Sept. 1, 1967.

§ 813-e. In what courts made

When an indictment, information or complaint upon which the defendant may be tried for a crime or offense has been filed in court, or after the defendant has been held by a magistrate to answer a charge in another court, the motion shall be made in the court having trial jurisdiction of such indictment, information, complaint or charge.

Before any indictment, information or complaint upon which the moving party may be tried for a crime or offense has been filed in a court, and before the moving party has been held by a magistrate to answer a charge in another court, the motion shall be made, if in a county outside of the city of New York, in the supreme court or the county court. In the city of New York, the motion, if made prior to September first, nineteen hundred sixty two, shall be made in a county court or the court of general sessions of the county of New York as the case may be, and, if made on or after September first, nineteen hundred sixty-two, in the supreme court.

If the motion is made in one of such courts before such an indictment, information or complaint is filed, or before

a magistrate has held the defendant to answer, and if, before determination of the motion, an indictment, information or complaint is filed in a different court, or the moving party is held by a magistrate to answer in a different court, the court before which the motion has been made shall not determine the motion but shall refer it to the court of trial jurisdiction. If, however, the motion has been determined at the time of the filing of the charge in the different court or at the time of the holding by the magistrate to answer in a different court, such determination shall be binding upon the court of trial jurisdiction, except that another motion may be made during trial pursuant to the provisions of section eight hundred thirteen-d. Added L.1962, c. 954, § 1, April 29, 1962.